

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Order to Forfeit
A Fine and Conditional License of
Jennifer Bergstrom to Provide
Family Child Care

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for Hearing before Administrative Law Judge Steve M. Mihalchick on November 18, 2002, at the Clay County Family Service Center, 715 North 11th Street, Moorhead, MN 56560. The hearing record closed on the date of the hearing.

Michelle C. Winkis, Assistant Clay County Attorney, 807 North 11th Street, Moorhead, MN 56560, appeared for the Minnesota Department of Human Services.

Jennifer Bergstrom, 509 North 11th Street, Moorhead, MN 56560, appeared pro se.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make a final decision after reviewing the administrative record, and may adopt, reject or modify these Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by the Report to file exceptions and present argument to the Commissioner. Parties should contact Linda Anderson, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155 to ascertain the procedure for filing exceptions or presenting argument. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2. The record closes upon the filing of comments, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

Should the Order to Forfeit a Fine in the amount of \$400 against Jennifer Bergstrom be affirmed?

Based on all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Jennifer Bergstrom is a resident of Clay County who is presently licensed as a family child care provider. She provides child care at her residence, which she rents from her father, at 509 North 11th Street in Moorhead.

2. Jennifer lists her mother on her substitute provider list, along with two to three other individuals.

3. On September 19, 2001, Kathleen Cardinal, a Daycare Licensing Specialist with Clay County Social Services, visited Jennifer Bergstrom's Day Care.^[1] Cardinal found that Bergstrom's front porch steps, consisting of five steps, did not have the required handrail and guardrails^[2] and that Bergstrom's mother did not have a current background check on file. Cardinal issued a correction order for the two items on that day.

4. On October 23, 2001, Cardinal sent a reminder letter to Bergstrom, and on October 29, 2001, another home visit was made to Bergstrom's daycare. The items were still not corrected and Cardinal issued another correction order.^[3]

5. On November 15, 2001, Cardinal sent Bergstrom another reminder letter, and on November 26, 2001, Cardinal spoke to Bergstrom on the telephone, at which time Bergstrom reported she still had not corrected either item. Cardinal issued yet another correction order.^[4]

6. On December 5, 2001, Cardinal phoned Bergstrom and informed her that a fine would be requested if Bergstrom did not correct both items by December 15, 2001. When Cardinal did a home visit on December 17, 2001, Bergstrom requested an extension to January 1, 2002, by which time her father would be available to make the porch repairs. Another correction order was issued on December 17, 2001.^[5]

7. At some point after the first correction order was issued, Bergstrom contacted her father to come and make the handrail/guardrail repair. After repeated requests to her father, who lives 40 miles away and is a busy small business owner, Bergstrom attempted to fix the guardrail on her own. The vertical slats on the guardrail she built were too far apart, and Cardinal informed Bergstrom that the guardrails did not meet the requirements of the building code.^[6]

8. At the home visit on January 2, 2002, Cardinal found that the two items were still not corrected. Cardinal took photos of Bergstrom's porch steps at that time.^[7]

9. On January 3, 2002, Cardinal recommended to the Department of Human Services that Bergstrom be fined for the two items pursuant to Minn. Stat. § 245A.04 and Minn. R. 9502.0425.^[8]

10. When Cardinal visited Bergstrom's home on January 7, 2002, the handrail and guardrails were installed and up to code. Bergstrom's mother had also completed the appropriate background release by that date.^[9]

11. The children and families that come to Bergstrom's daycare do not use the front porch or stairs, and because of that fact, Bergstrom rarely shovels the front walkway and steps. Bergstrom has a back entrance with a coatroom that is the main entrance for her daycare families.^[10] Specifically, Bergstrom's families did not use the front steps and porch during the time in question, September 19, 2001 until January 7, 2002.

12. Bergstrom did not require a substitute care provider, her mother or any other, during the period of September 19, 2001 until January 7, 2002.^[11] Since that time Bergstrom has only required a substitute once, and her mother provided that service.

13. On June 26, 2002, the Department of Human Services issued an Order to Forfeit a Fine^[12] and Order of Conditional License^[13] to Bergstrom based upon Minn. Stat. § 245A.04, subd. 3(c) and Minn. R. 9502.0425.^[14] Bergstrom was fined \$200 per item and given notice of her right to request a contested case hearing. As conditions on her license for a period of one year, Bergstrom was ordered to correct the two items, obtain a minimum of four hours of licenser-approved additional safety training, and notify all of her daycare families of the terms of the conditional license.^[15] Bergstrom was also informed of her right to request reconsideration of the conditional license.

14. At the time Cardinal requested the fine she was under the impression that the total fine would be approximately \$100 for both items. Cardinal was shocked by the amount of the fine and testified that had she known that the fine would be \$400, she would not have pursued the fine regarding the background check form. Cardinal testified that Bergstrom is an excellent daycare provider who just needs occasional reminders.

15. In a letter dated July 3, 2002, Bergstrom requested reconsideration of both the fine and the conditional license.^[16]

16. The Department served on Bergstrom a Notice and Order for Hearing regarding the fine on September 11, 2002, setting the hearing to take place on November 18, 2002.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper and timely notice of the hearing in this matter and has complied with all substantive and procedural requirements of law and rule.

3. Pursuant to Minn. R. 9502.0425, subp. 10, stairways of three or more steps must have handrails, and further, “[a]ny open area between the handrail and stair tread must be enclosed with a protective guardrail as specified in the State Building Code.”

4. The Uniform Building Code generally requires handrails on both sides of stairways. However, an exception allows private stairways or stairways serving one single dwelling unit to have only one handrail.^[17]

5. The Uniform Building Code requires that open sides of stairways be protected by a guardrail.^[18] “Open guardrails shall have intermediate rails or an ornamental pattern such that a sphere 4 inches (102 mm) in diameter cannot pass through.”^[19] The triangular area formed by the tread of the stair, the rise of the stair and the guardrail must not create a gap of more than 6 inches.^[20]

6. Minn. Stat. § 245A.04, subd. 3(a) mandates that the Commissioner of Human Services conduct a background study of the individuals specified in subd. 3(c), which include “current employees or contractors of the applicant who will have direct contact with persons served by the . . . program.” The background study forms must be submitted to the Commissioner before the individual begins direct contact with the program participants.

7. Clay County Social Services’ correction orders and the Department’s subsequent conditional license were issued to Bergstrom pursuant to Minn. Stat. § 245A.06, subd. 1. Correction orders and conditional licenses are subject to review by the Department of Human Services through the reconsideration process and are therefore not subject to a contested case hearing.^[21] The only reviewable issue here is the imposition of the fine.

8. Minn. Stat. § 245A.07, subd. 1 provides that the Commissioner of Human Services may impose a fine against the license holder who does not comply with applicable rules or law. When applying sanctions, the Commissioner must consider “the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.”

9. Minn. Stat. § 245A.07, subd. 3 states that the Commissioner may impose a fine if a license holder fails to comply fully with applicable law or rule.

10. Minn. Stat. § 245A.07, subd. 3(b)(4) provides that the Commissioner must fine license holders \$200 for “each occurrence of a violation of law or rule governing matters of health, safety, or supervision, . . . and failure to submit a background study” on employees who have contact with persons served by the program.

11. It is the Commissioner’s burden to first demonstrate reasonable cause to believe that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates reasonable cause existed, then the license holder must show by a preponderance of the evidence that she was in full compliance with the law or rule at the time of the alleged violations.^[22]

12. Licensee’s porch has a stairway of three or more steps, open on both sides, which did not have the appropriate handrail and guardrails at the time of the alleged violation. While Licensee’s stairway may have only one handrail, guardrails are required on both sides of the stairway. Licensee’s attempt to construct a guardrail after issuance of the correction orders did not comply with applicable rule or code because the intermediate rails were more than four inches apart. When Licensee realized her father would not be able to help her fix and install the railings in a timely manner and that she would be unable to undertake the project herself, she could have enlisted the help of someone else. Only after repeated reminders and finally the issuance of a letter by the licensing worker recommending a fine was the repair made. While it is true that Licensee’s daycare children rarely, if ever, used the front porch steps, the fact remains that a child could have been injured on the steps due to the lack of appropriate railing. This violation could have been a safety issue and Kathleen Cardinal of Social Services pursued the fine for that reason.^[23] The violation is not severe in nature, but it became chronic when Cardinal had to issue repeated reminders.

13. Licensee’s mother was listed as an emergency substitute for Licensee and was in a position to have direct contact with persons served by the program. While Licensee should have provided her mother’s background check form when she listed her as an emergency substitute, her mother never began direct contact with the daycare program participants prior to submitting the appropriate form, and no violation occurred. Licensee’s mother never provided substitute daycare until after her background study was completed. Furthermore, Licensee had other emergency substitute providers available who had background checks on file who could have been called in an emergency. Additionally, due to her inexperience with issuing fines, Cardinal was shocked upon learning of the amount of Licensee’s fine and felt that a \$400 total penalty was too severe. Cardinal attested to the high quality of Licensee’s daycare program and her strong reputation in the community.

14. While the terms of and compliance with conditional licenses are not within the authority of the Administrative Law Judge, it should be noted that Licensee has complied with the conditional license and has even gone above and beyond her obligations, despite this pending appeal, to notify each of her daycare families about the nature of the conditions. Also to her credit, Licensee immediately remedied the

handrail/guardrail and background study items upon issuance of Cardinal's letter to the Department requesting a fine.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: (1) That the Order to Forfeit a Fine dated June 26, 2002 be AFFIRMED in part and REVERSED in part; (2) That the Order to Forfeit a Fine of \$200 for failure to have the appropriate handrail and guardrails be AFFIRMED; (3) That the Order to Forfeit a Fine of \$200 for failure to submit a background study request be RESCINDED; and (4) That the Licensee be fined a total of \$200.

Dated: December 5, 2002

S/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Minnesota Department of Health is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded.

^[1] Ex. 1 and Testimony of Kathleen Cardinal.

^[2] Clay County Social Services distributes a one-page diagram of handrail and guardrail requirements to daycare providers.

^[3] Ex. 1 and Testimony of Kathleen Cardinal.

^[4] Ex. 1 and Testimony of Kathleen Cardinal.

^[5] Ex. 1 and Testimony of Kathleen Cardinal.

^[6] Testimony of Jennifer Bergstrom.

^[7] Ex. 1 and Ex. 4.

^[8] Ex. 1 and Testimony of Kathleen Cardinal.

^[9] Testimony of Kathleen Cardinal.

^[10] Testimony of Jennifer Bergstrom.

^[11] Testimony of Jennifer Bergstrom.

^[12] Minn. Stat. § 245A.07, subd. 3.

^[13] Minn. Stat. § 245A.06.

^[14] Ex. 2.

^[15] As the appeal on the conditional license is pending, Bergstrom is not required to notify her daycare families about its terms. Nevertheless, Bergstrom has informed each family of the nature of the conditional license.

^[16] Ex. 3.

^[17] Uniform Building Code (94) Section 1006.9.

^[18] Uniform Building Code (97) Section 509.1.

^[19] Uniform Building Code (97) Section 509.3.

^[20] Uniform Building Code (97) Section 509.3.

^[21] Minn. Stat. § 245A.06, subds. 2 and 4.

^[22] Minn. Stat. § 245A.08, subd. 3(a).

^[23] Testimony of Kathleen Cardinal.